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No. 94-511

In the

Supreme Court of the United States

October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER FLORIDA ROCK INDUSTRIES, INC.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest law foundation which works for the protection of private property rights and a balance in governmental regulation. PLF attorneys represented, for example, the Nollans in *Nollan v. California Coastal Commission*,

483 U.S. 825 (1987), and PLF has frequently filed amicus briefs in support of property rights.

Letters of permission to file this brief have been lodged with this Court pursuant to Supreme Court Rule 37.

SUMMARY OF ARGUMENT

If the Just Compensation Clause of the Fifth Amendment to the United States Constitution is to have any *practical* meaning in the context of regulatory takings, government agencies must not be able to point to a *theoretical* "residual" and speculative value remaining in a regulated property to support the argument that because the property has some value there has been no taking. The fair market value of property, in the context of the Just Compensation Clause, in *both* straight condemnation and inverse condemnation cases, must not be overly influenced by unreasonable speculation or buyer ignorance. To require an undue consideration of the speculative value in property would be a poor public policy choice because it would encourage land sales to the unwary.

ARGUMENT

I

INTRODUCTION

This decade-old case involves the question of whether the owner of a regulated wetland can ever receive just compensation for a regulatory taking. Florida Rock's petition asks in particular how a court should determine how much, if any, value remains in a parcel of property after a

regulation prohibits all productive use of that property. In an otherwise well-reasoned and well-written decision, the Federal Circuit Court of Appeals below seriously erred in establishing guidelines for determining the fair market value of property that is rendered unusable by the application of federal wetlands regulations. In derogation of the ethical foundations of the law, the Federal Circuit ruled that the fair market value should reflect the degree to which property retains some residual or speculative value based on a market constituted of unknowledgeable "investors" from Arizona and elsewhere who might have been willing to purchase the proverbial swampland in Florida--swampland made utterly unusable by government regulation. *See* Opinion of Federal Circuit Court of Appeals, reprinted in Petitioner's Appendix at 15-16.

While the court below properly noted that there still might be a regulatory taking even if some value remains in a parcel, it incorrectly determined that the value should be influenced by a questionable offer from an Arizona speculator or mere speculation--even speculation as remote (and irrelevant) as the possibility that the offending regulation might someday be rescinded. *Id.* at 16. In other words, because persons might be willing to purchase the property either out of ignorance or because of a speculative hope that the offending regulation might be eliminated, the court found that the property had a significant fair market value, lessening the possibility that a court could find that a regulatory taking has occurred. *Id.*

This Court has never before determined how fair market value should be determined in the context of a regulatory taking case. The notion of the court below that the speculative value of property, a value that can exist only in a vacuum where the impact of the offending regulation is ignored, is contrary to the principles of equity inherent in the Fifth Amendment. It is also contrary to prior decisions of this and other federal courts which have considered the

meaning of fair market value in the context of government condemnation litigation.

II

THE DETERMINATION OF A PROPERTY'S VALUE DEPENDS ON ITS FAIR MARKET VALUE WHICH IN TURN DEPENDS ON A MARKET OF KNOWLEDGEABLE BUYERS IN A WORLD IMPACTED BY ALL RELEVANT GOVERNMENT REGULATIONS

A key factor in determining whether or not there has been a regulatory taking of private property is whether the regulation denies a property owner of "economically viable use" of an affected property. *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). This will depend in part upon the "economic impact" of the regulation and the degree to which the "regulation has interfered with distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978). A regulation which destroys all "economically beneficial or productive use of land" is a per se taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798, 813 (1992)[1]. If the court below is correct, however, *Lucas* is a nullity because no property can ever lose all its value if value must include speculation that the offending regulation will be

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[1] *See also* 120 L. Ed. 2d at 814 ("productive or economically beneficial use of land," "economically beneficial or productive options for its use") and 120 L. Ed. 2d at 815 (a taking if regulation leaves "property economically idle").

Of course, as the court correctly noted below, there can be a taking even if less than all value of property is destroyed. Opinion, Petitioner's Appendix at 25-28.

removed or consideration of investors not fully aware of the scope of a regulation. Furthermore, this Court's focus in *Lucas* on the "use" of land being denied would also become a nullity because "use" and "value" are distinct concepts.

The decision below will also force courts to embrace two distinct and contradictory definitions of fair market value of property. One definition will be used for traditional condemnation cases, where this Court and the lower courts have routinely eschewed the influence of unsubstantiated speculation. The other definition will apply in inverse condemnation cases where speculation will be embraced. This speculation, furthermore, will depend not only on the hopes of the traditional speculator looking to make a killing in the retail land sales market, but also a new breed of speculator looking to make a killing by buying up heavily regulated properties in the hope that the regulations might someday disappear. *See* Opinion, Petitioner's Appendix at 16.

A. Fair Market Value Depends on Knowledgeable Buyers

In the past, in eminent domain cases, the government not surprisingly has argued that "fair market value" should not encompass knowledge when it is based on unrealistic speculation. The decision below turns this principle on its head. Decisions from the lower federal courts exemplify the state of the law prior to the decision below. In *Robertson v. Routzahn*, 75 F.2d 537 (6th Cir. 1935), *cited in Black's Law Dictionary*, it was held:

> Fair market value is the price in money or its equivalent that the property will bring at a voluntary sale to a willing buyer, both the seller and

> buyer *having adequate knowledge of the material facts affecting the value.*

75 F.2d at 539 (emphasis added).

Not only do courts require knowledge to be a basis of determining fair market value, but courts also have required that knowledge to be reasonable. For example in condemnation cases, where the federal government has argued for a lower fair market value, the government has strenuously argued *against* consideration of the speculative value of property--which is of course exactly what the government is arguing *for* in this case. The courts, however, have steadfastly agreed with the government's usual position that unwarranted speculative value of property should be ignored in determining fair market value. Thus, in *United States v. 117,763.00 Acres of Land in Imperial County, California,* 410 F. Supp. 628 (S.D. Cal. 1976), *aff'd sub nom. United States v. Shewfelt Investment Co.,* 570 F.2d 290 (9th Cir. 1977), the court held:

> [T]he market value of these lands is not the kind of a market value on which a condemnation award should be based .... There is no doubt that speculators have traded in the land and have, in that sense, established a market.
>
> If the market value of land is based on speculation, then it is proper in determining just compensation to ask on what the speculation depends. Does it depend upon an appraisal of the land in terms of its uses ... [o]r does it depend upon the thesis that there's a sucker born every minute and that, if the large tracts of land are broken into smaller tracts, sooner or later the

land can be sold at a profit even if it has no value?

410 F. Supp. at 631-32.

This Court has also cautioned against excessive use of speculation. In *Olson v. United States,* 292 U.S. 246, 257 (1934), this Court disallowed "mere speculation and conjecture to become a guide for the ascertainment of value." *See also McCandless v. United States,* 298 U.S. 342, 345 (1936) (fair market value is "most profitable use to which the land can probably be put in the reasonably near future"; *United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 275 (1943) (value includes uses to which land "may be readily converted"); *see also Klein v. United States,* 152 Ct. Cl. 221 (1961) (court considered reasonable speculation based on more realistic possibilities, but court did not accept the full speculative value). The trial court below correctly rejected basing the fair market value of the property on a lack of knowledge or unreasonably speculative "dreams of avarice." Opinion of United States Claims Court, *reprinted in* Petitioner's Appendix at 80. The Court of Appeals' embrace of speculative value is thus inconsistent with prior opinions of this Court.

B. Public Policy Would Not Be Served by Adopting a "Caveat Emptor" Definition of Fair Market Value

The opinion of the court below will result in the denial of inverse condemnation awards to property owners when there might be a market for the property among investors unaware of the true consequences of the impacts of a particular regulation or among persons willing to bet that the regulation may someday be rescinded. If the only way a property owner could receive value for a regulated property would be to sell it not to the government but to unsophisticated or foolish buyers, there would be a most peculiar and penurious result. By encouraging companies like Florida

Rock to foist their wetlands properties on the unsuspecting public, ultimately only the smallest and most unsophisticated investors would end up holding these worthless properties.[2] And these small investors are those who are least likely to have the resources to sue the government for a takings claim! These small landowners would quickly become broke--certainly not an intended consequence of either the wetlands regulations or the Constitution. Yet, if the decision below were to remain supporting a market value based on a hope of perpetual public ignorance, then large landowners like Florida Rock would be forced to engage in immoral, if not illegal, practices in order to avoid the consequences of government's evasion of its responsibilities under the Takings Clause.

A public policy that forces small and unsuspecting investors to bear the brunt of the cost of regulatory takings, and a public policy that is directly aimed at taking the property of those individuals least able to fight back, is surely, in the words of John Locke, a tyrannical policy:

> For where-ever the Power that is put in any hands for the Government of the People, and the Preservation of their Properties, is applied to other ends, and made use of to impoverish ... it presently becomes Tyranny.

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[2] This also might be illegal. If Florida Rock's 98 acres were subdivided into many smaller lots, then the federal Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.*, and Florida's Land Sales Practices Act, Fla. Stat. § 497.001, *et seq.*, would make it mandatory to disclose to potential buyers that the land is unbuildable. With such disclosure, it is likely that although the property would never dry up, land sales would. In short, there is no honest fair market value for this land.

Locke, *Second Treatise on Government* § 201 (emphasis in original). *See also* Sections 199, 222, and 229.

III

CONCLUSION

In analyzing the economic impact of a government regulation, the courts must be directed to evaluate the fair market value of the property before and after imposition of the regulatory requirement without regard to a pool of unwary or foolish investors who speculate that the regulation causing the alleged regulatory taking might someday be lifted. Otherwise property owners would be forced to peddle regulated properties to the uninformed who have a bit of cash but no understanding of the less than benign nature of government and the effects of its regulatory mechanisms. Sound public policy should not be dependent on schemes that place the greatest burden of regulatory programs on those least able to understand and afford the cost. The petition for certiorari should be granted.

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Respectfully submitted,

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